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Supreme Court of the United States

FRANCISCO SANCHEZ, PETITIONER,

v.

CLARENCE DUPNIK, PIMA COUNTY SHERIFF,
KARL J. WOOLRIDGE, JANE DOE DOYLE, DONALD DOYLE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER MR. SANCHEZ WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE DISTRICT COURT PRECLUDED HIM FROM DISCLOSING A SUBSTITUTE POLICE PRACTICES EXPERT WHERE THERE EXISTED NINE (9) MONTHS BEFORE THE MATTER PROCEEDED TO TRIAL SUCH ERROR WAS COMPOUNDED WHEN THE DISTRICT COURT IMPROPERLY ASSUMED IT HAD THE AUTHORITY TO DENY MR. SANCHEZ'S REQUEST TO CALL RESPONDENTS' POLICE PRACTICES EXPERT IN HIS CASE IN CHIEF.

II. WHETHER MR. SANCHEZ WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE DISTRICT COURT PRECLUDED EVIDENCE OF THE ACQUITTAL OF MR. SANCHEZ AT THE RELATED CRIMINAL TRIAL AS IRRELEVANT EVEN THOUGH SUCH EVIDENCE WAS NECESSARY FOR A DETERMINATION OF QUALIFIED IMMUNITY, APPLICATION OF THE REASONABLE OFFICER STANDARD AND AWARDING OF PUNITIVE DAMAGES IN HIS CIVIL RIGHTS TRIAL.

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JURISDICTION

Petitioner's Complaint alleged a violation of his federal civil rights and sought relief against Respondents under 42 U.S.C. § 1983. The District Court had original jurisdiction over the claim pursuant to 28 U.S.C. § 1343. The Ninth Circuit Court of Appeal had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291. A timely Petition for Panel Rehearing was denied on February 24, 2010. A Motion to Vacate Mandate was denied on April 30, 2010. Also, on April 30, 2010, the Ninth Circuit Court of Appeal declined to hear a Petition for Rehearing En Banc filed on March 11, 2010 determining it to be untimely. This Petition for Writ of Certiorari is filed within ninety (90) days of the date of the Court of Appeals' denial of Petitioner's timely filed Petition for Panel Rehearing. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.3. The jurisdiction of this Honorable Court is pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a)(3):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ...
>
> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Fed. R. Civ. P. 37 (b)(2)

> *Sanctions in the District Where the Action is Pending.*
>
> (A) For Not Obeying a Discovery Order. If a party . . . fails to obey an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.

Fed. R. Evid. 401

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Ninth Circuit Model Civil Jury Instructions 5.5-Punitive Damages

> . . .You may award punitive damages only if you find that the defendant's conduct that harmed the plaintiff was malicious, oppressive or in reckless disregard of the plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring the plaintiff. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or omission is oppressive if the defendnat injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of the plaintiff. . .

Ninth Circuit Model Civil Jury Instructions 9.22-Fourth Amendment-Unreasonable Seizure of Person-Excessive (Deadly and Nondeadly) Force

> . . .Under the Fourth Amendment, a police officer may only use such force as is "objectively reasonable" under all of the circumstances. In other words, you must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. . .

STATEMENT

Petitioner, Francisco Sanchez, filed a 42 U.S.C. § 1983 action against Respondents for their actions on May 25, 2003 alleging that Respondents used excessive force during the unlawful detention of him. On that date, Mr. Sanchez was attending a concert with his wife and young children at Old Tucson Studios. An altercation between another man and Respondent, Pima County Sheriff's Deputy Woolridge, occurred. Mr. Sanchez was a member of the crowd in the immediate vicinity of the altercation. At some point during the altercation, Respondent Woolridge claims to have been punched in the head and doused with a beer. Upon turning to face his assailant, Respondent Woolridge deduces that of the crowd of on-lookers Mr. Sanchez was the person who had assaulted him. Respondent Woolridge then attempted to detain Mr. Sanchez and tased him. Immediately after being tased, Respondent Doyle, another Pima County Sheriff's Deputy, struck Mr. Sanchez to although further compliance was not necessary. During the process of detaining him, Mr. Sanchez sustained a broken ankle in

multiple locations which has required four surgeries and has rendered him disabled. After observing the clearly broken ankle, Respondents essentially hog-tied Mr. Sanchez and drug him from the area. This action resulted in serious injury to Mr. Sanchez's wrists necessitating additional surgeries to correct those problems. Mr. Sanchez was charged criminally with misdemeanor aggravated assault and disorderly conduct and was acquitted of such charges following a bench trial in the Pima County Justice Court.

The Rule 16 Scheduling Order was filed on April 11, 2006. The District Court ordered Mr. Sanchez to disclose the names of the expert witnesses and expert reports to be used at trial on or before August 9, 2006. On August 10, 2006, Mr. Sanchez filed the Plaintiff's First Supplemental Disclosure Statement which included police practices expert, Ken Barnes and his report. It does not appear from the record that the Respondents objected to the short delay in the disclosure of Mr. Sanchez's expert. The parties then filed a stipulation to extend discovery deadlines on September 19, 2006 which was granted and entered on November 8, 2006. The discovery deadline was extended to January 31, 2007. At some point during the Spring of 2007, it appears from the record that Mr. Sanchez's expert died necessitating that the parties file a Stipulation to Extend Plaintiff's Expert Deadlines to April 1, 2007. It does not appear that the District Court ever entered an Order accepting the Stipulation. In April, May and June of 2007 the parties were involved in settlement proceedings with United States Magistrate Judge Charles Pyle. A Joint Proposed Pretrial Order was filed on July 5, 2007. At that time Mr. Sanchez was becoming increasingly concerned

about the commitment to his case by his attorney, Herb Beigel, and was consulting other attorneys in town including counsel undersigned. As a result, Mr. Sanchez filed a Motion to Withdraw from the Joint Pretrial Order/Notice of Intent to Hire New Counsel. In support of Mr. Sanchez's position, counsel undersigned submitted affidavits setting forth her assessment of the case, need for an expert, availability of an expert and her advanced state of pregnancy which would require the trial to be held several months later permitting ample time for a new police practices expert to be disclosed without prejudice to Respondents. (App. 26a-34a). Mr. Sanchez's Motion was heard on November 19, 2007. During that hearing the Honorable Raner Collins made the following ruling:

> I'm going to strike the joint pretrial, the stipulation at this point in time. There will be no reopening of the discovery. I'm going to set the final pretrial conference in this case for December 17 at 1:30.

(App. 4a). He went on to clarify that there would be "[n]o new witnesses, no new discovery, the case [is] ready for trial." (App. 6a).

Counsel undersigned substituted in for Herb Beigel as Mr. Sanchez's attorney on December 7, 2007. The Pretrial Conference was held on January 7, 2008. At that Conference, the first and only trial date was set for August 19, 2008 and a Motions Hearing was set for August 4, 2008.

At the Motions Hearing, numerous motions in limine were addressed. It is the District Court's

granting of Defendants' Motion in Limine No. 2 Re: The Not Guilty Decision in Plaintiff's Criminal Case that is one of the issues in this appeal. (App. 7a). In spite of counsel undersigned's argument that the acquittal on the criminal charges goes to whether or not the citation was appropriate in its basis in fact or whether or not it is relevant to the officer's state of mind, the judge precluded the criminal acquittal finding that it was not relevant. (App. at 11a-13a).

At the end of the Motions Hearing, counsel undersigned sought leave to call the Respondent's expert, Lt. Kester, in Mr. Sanchez's case -in-chief as Mr. Sanchez's police practices expert. (App. 16a-18a). Not surprisingly, defense counsel objected pointing out the failures of Mr. Sanchez's prior counsel and his failure in securing an expert after having adequate time to do so. (App. 17a). The judge agreed with defense counsel and denied the request making no findings of fact or conclusions of law. *Id.*

The matter proceeded to a jury trial on August 19, 2008 and judgment was entered in favor of the Respondents and against Mr. Sanchez. Shortly thereafter Respondents submitted a Bill of Costs seeking $4,705.70 in costs. Mr. Sanchez filed an objection to the Bill of Costs. On October 2, 2008, Mr. Sanchez filed his Notice of Appeal. Curiously, the Amended Judgment in a Civil Case was made that same day and filed on October 3, 2008. The Amended Judgment imposed costs against Plaintiff in the amount of $4,705.70.

A timely Notice of Appeal was filed and the matter was briefed accordingly. Oral Argument was

held before a three judge panel consisting of the Honorable Mary Murphy Schroeder, the Honorable Consuelo Maria Callahan and the Honorable Barbara M.G. Lynn, U.S. District Judge for the Northern District of Texas, sitting by designation. The Memorandum Decision affirming the judgment was filed on January 14, 2010. (App. 19a-22a). A timely Petition for Panel Rehearing was denied. (App. 23a). The Mandate was filed on March 4, 2010. (App. 24a). On March 11, 2010, Petitioner filed what he believed to be a timely Motion to Recall Mandate and Petition for Rehearing En Banc. On April 30, 2010, the Court of Appeals filed its Order denying the Motion to Recall Mandate and declining to consider the Petition for Rehearing En Banc claiming it to be untimely. (App. 25a).

This Petition seeks review by this Honorable Court of the District Court's erroneous closure of discovery preventing Mr. Sanchez from calling a police practices expert in his case in chief even though nine (9) months remained before the matter would proceed to trial such error was compounded when the District Court improperly assumed it had the authority to deny Mr. Sanchez's request to call Respondents' police practices expert in his case in chief. This Petition further seeks review of the District Court's erroneous determination that evidence of the acquittal of Mr. Sanchez at the criminal trial on the merits arising out of the same facts as his civil rights claims was irrelevant even though the evidence goes to the state of mind of Respondents for purposes of determinations of qualified immunity, reasonable officer standard and punitive damages. The erroneous discovery and evidentiary rulings of the District Court resulted in Mr.

Sanchez being denied a fair trial resulting in a denial of his right to Due Process.

REASONS FOR GRANTING THE PETITION

The actions of the District Court raise important questions as to the proper application of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 1095, 2 L.Ed.2d 1255 (1958). The District Court's erroneous application of the rules resulted in Mr. Sanchez being denied the opportunity to have a fair trial and resulted in his being denied due process of law.

I. MR. SANCHEZ WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE DISTRICT COURT PRECLUDED HIM FROM DISCLOSING A SUBSTITUTE POLICE PRACTICES EXPERT WHERE THERE EXISTED NINE (9) MONTHS BEFORE THE MATTER PROCEEDED TO TRIAL SUCH ERROR WAS COMPOUNDED WHEN THE DISTRICT COURT IMPROPERLY ASSUMED IT HAD THE AUTHORITY TO DENY MR. SANCHEZ'S REQUEST TO CALL RESPONDENTS' POLICE PRACTICES EXPERT IN HIS CASE IN CHIEF.

At issue herein is the propriety of the District Court's closure of discovery and thus, preclusion of Mr. Sanchez from calling a police practices expert at his civil rights trial complaining of excessive force. The exclusion of evidence by the district court is reviewed

for an abuse of discretion regardless of whether the exclusion was pursuant to Rule 37 or the court's inherent powers. *Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp.*, 982 F.2d 363, 367 (9th Cir. 1992). It has long been recognized that "[t]he inherent powers of federal courts are those which 'are necessary to the exercise of all others,'" and include 'the 'well-acknowledged' inherent power . . . to levy sanctions in response to abusive litigation practices." *Fjelstad v. American Honda Motor Co*, 762 F.2d 1334, 1338 (9th Cir. 1985)(*quoting Roadway Express, Inc. V. Piper*, 447 U.S. 752, 764-65, 100 S.Ct. 2455, 2463-64, 65 L.Ed.2d 488 (1980)(*quoting United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812))). Unfortunately, in the matter at bar, there was no formal reference to Rule 37 as a basis for the exclusion; nor, was there any findings of fact or conclusions of law in support of the exclusion. In light of the fact that Mr. Sanchez was not permitted to call any experts at trial, not even to rebut the Respondent's expert, it cannot be said that such exclusion was harmless and not prejudicial given the defense verdict. In fact, it cannot be said that preclusion in this matter did not vitiate Mr. Sanchez's case . . . having the same effect as the granting of summary judgment or the handing down of a directed verdict which would entitle Mr. Sanchez to de novo review. *See e.g. Yang v. Brown University*, 149 F.R.D. 440 (D.R.I. 1993).

"Rule 37(b)(2) requires that 'any sanction [imposed pursuant to it] must be 'just.'" *Fjelstad, supra* at 1340 (*quoting Insurance Corp. Of Ireland v. Compagnie des Bauzited de Guinee*, 456 U.S. 694, 707, 102 S. Ct. 2099, 2106, 72 L.Ed.2d 492 (1982)). Preclusion of a police practices expert in a civil rights excessive

force case is not "just." Failure to comply with the discovery rules should not be strongly sanctioned where the failure was due to inability, and not to willfulness, bad faith, or any fault of petitioner. *See Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 1095, 2 L.Ed.2d 1255 (1958). Additionally, where there remains several months until the trial date within which the defense can easily depose a newly disclosed expert, an abuse of discretion may be found. *See In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994).

The Court of Appeals overlooked the fact that the District Court made no record in support of its decision not to reopen discovery and allow Mr. Sanchez to call a substitute police practices expert. As a result, it is unknown whether the District Court was exercising its inherent powers or imposing sanctions based on a Rule 37 violation. *See Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp.*, 982 F.2d 363, 367 (9th Cir. 1992). It seems by the language of the Memorandum that the Court of Appeals had assumed that the District Court's decision was based on Rule 37. However, no one will ever know the basis of the decision since the District Court failed to set forth any findings of fact or conclusions of law in support of the exclusion.

Based on the history of the case, it cannot be said that Mr. Sanchez's failure to disclose a replacement expert was willful, in bad faith or any fault of his. Furthermore, the record is clear that at no time prior to counsel undersigned becoming involved in the case did

the defense raise any objection or file any motion to preclude a substitute police practices expert.

Certainly, there was no Motion for Sanctions before the District Court and there was no finding that Mr. Sanchez had violated the District Court's Orders or deadlines. In fact, contrary to the Court of Appeals's finding, there were **no** deadlines in place. This is evident since there does not appear to be an actual order in place that Mr. Sanchez violated since the record is devoid of any order regarding the stipulation to extend the discovery deadline for the his new expert to April 1, 2007. There must be some form of court order that has been disobeyed in order for Rule 37 to be applied–general discovery abuse is not sufficient. *Unigard*, *supra* at 368.

Furthermore, the Court of Appeals assumed without proof of any sort that lifting the deadlines would have caused disruption to the District Court's and opposing parties' schedules and that such disruption was not harmless. It must be recognized that no disruption would have occurred to the District Court's schedule in light of the delays needed to accommodate defense counsel's maternity leave. Moreover, there would have been little to no disruption to the opposing parties' schedule since the replacement expert had been previously deposed in a matter which was factually similar less than a year before and an attorney in her office had had the opportunity to cross-examine the expert at a trial in a factually similar matter less than a year before. The defense certainly has made no assertion that disclosure of a replacement expert would necessitate the filing of any additional pretrial motions or any dispositive motions to the case.

In fact, during Oral Argument, defense counsel conceded that no motion for a directed verdict was filed or made as a result of Mr. Sanchez's lack of expert testimony.

Regardless of whether the preclusion was done pursuant to Rule 37 or the District Court's inherent powers, denying Mr. Sanchez's request to call a police practices expert was not a proper sanction and was not a proper exercise of the District Court's authority to effectively manage its docket and the administration of the case at bar. As a result, reversal is warranted where there is no record to evaluate in order to determine the propriety of the District Court's actions.

Moreover, no rule or law exists preventing Mr. Sanchez from calling the defense's expert in his case in chief. In fact, counsel undersigned mistakenly afforded the District Court a power it did not possess by asking permission to call the defense's expert. In reality, the trial strategy to call the defense's expert need not have been made public until the moment Mr. Sanchez called him to the stand. The fact that permission was asked 15 days before trial merely avoided the heated objections which were sure to be made in front of the jury when the expert was called. Therefore, a finding that the District Court did not abuse his discretion by denying the request to call an opponent's expert vests the District Court with authority it did not have.

Every trial attorney knows that a lot of successes at trial are based on appearances and perceptions by the jury. This is a fact that opposing counsel acknowledged in her Oral Argument when she spoke of perceptions at trial. Failing to have an expert

supporting Mr. Sanchez's claim that Woolridge and Doyle used excessive force would give the perception that no amount of money could buy an expert opinion asserting as much. With the District Court's decision denying the re-opening of discovery to permit the disclosure of a replacement expert, counsel undersigned made every effort to level the playing field at trial. In so doing, the trial strategy to call the defense's expert in Plaintiff's case in chief was made. Such a strategy obviously has its dangers since the expert would no longer be cross-examined and could in fact present quite hostile during the trial. However, since counsel undersigned had had the opportunity to cross examine the defense's expert in a previous trial, any risk was far outweighed by the need to present an expert.

The Court of Appeals further asserted that Mr. Sanchez was permitted to fully cross examine the defense's expert. However, since the cross-examination was never submitted on appeal, it is difficult to understand how such a determination could be made. It would seem that the Court of Appeals is merely going off of the claims of opposing counsel during her Oral Argument. Clearly, the effectiveness of the cross-examination can only be made by reviewing the cross-examination which certainly would have been made available upon request.

Lastly, the Court of Appeals claimed that "[t]he district court properly **could have** concluded that the *flimsy* reasons for altering the order of presentation of evidence so soon before trial were outweighed by the risk of unfair surprise and prejudice to Defendant's anticipated presentation of their case." Here it seems that the Court of Appeals is advancing reasons in

support of the District Court's decision. But, the record is silent once again as to the District Court's rulings. It would be one thing if the District Court had stated that he was denying the request because the reasons advanced were flimsy and were outweighed by the risk of unfair surprise and prejudice to Defendants' anticipated presentation of their case. But, since he made no finding or ruling and advanced no reasons for his decision denying the request we cannot now sit back and assume why he denied the request. For all of these reasons, the District Court's decision warrants reversal and a new trial.

There can be no doubt that a judge's erroneous rulings left unaddressed may foster and engender subsequent erroneous rulings. Furthermore, it is the case law and precedent of the Courts that Judges look to in order to assist them in ruling on issues presented in cases. Where a judge makes a case altering decision by precluding the disclosure of a substitute police practices expert in a civil rights case where sufficient time existed to prepare for the new expert and no prejudice would result to the opposing party, abuse of discretion does exist especially where the trial judge does not make an adequate record in support of his decision. Reversal of such a decision would assist future similarly situated judges in assessing what sanctions if any to impose in such matters. Such failures and improper assumption of powers by the District Court as those discussed above present important questions which would prove educational to the discovery sanctions and decisions imposed by all future similarly situated justices.

II. MR. SANCHEZ WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE DISTRICT COURT PRECLUDED EVIDENCE OF THE ACQUITTAL OF MR. SANCHEZ AT THE RELATED CRIMINAL TRIAL AS IRRELEVANT EVEN THOUGH SUCH EVIDENCE WAS NECESSARY FOR A DETERMINATION OF QUALIFIED IMMUNITY, APPLICATION OF THE REASONABLE OFFICER STANDARD AND AWARDING OF PUNITIVE DAMAGES IN HIS CIVIL RIGHTS TRIAL.

It is elementary for legal scholars that relevant evidence is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. As this Honorable Court is well aware, in an excessive force claim, the jury must determine the actions of the accused officer by applying the reasonable officer standard. *See* Ninth Circuit Model Civil Jury Instructions 9.22. Therefore, any evidence having **any** tendency to show the actions of an accused officer did or did not conform with the reasonable officer standard is relevant. Where the circumstances surrounding the dismissal of criminal charges show that a citation was without basis in fact, such evidence might be relevant to show the officers' state of mind. *See Newell v. Town of Oro Valley*, 163 Ariz. 527, 530789 P.2d 394 (App. 1990).

There is a difference between a criminal matter dismissed on a technicality and one resulting in acquittal following a bench trial on the merits.

Evidence of the acquittal of Mr. Sanchez on the charges of aggravated assault and disorderly conduct following a bench trial is relevant in the present matter to show the officers' state of mind and to permit an inference that the charges were without a factual basis. Mr. Sanchez concedes that the majority of case law on this issue renders the proffered evidence as irrelevant. However, most of those cases deal with the dismissal of charges in criminal matters for technical reasons, for instance, where the charges are dismissed at the preliminary hearing stage. *See e.g. DeAnda v. City of Long Beach*, 7 F.3d 1418 (9th Cir. 1993). Or, where the dismissal is for unrelated technical reasons such as the failure to read a suspect certain rights, as was the case in *Newell*, the dismissal is indeed not relevant to the civil rights claims of excessive force. *See Newell, supra.* However, there seems to be no case on point where the plaintiff in a civil rights matter was previously acquitted of crimes directly associated with the civil rights claims and such evidence of acquittal was admissible.

In the present matter, Mr. Sanchez was criminally charged with aggravated assault and disorderly conduct. A lengthy bench trial was held with five witnesses, including Mr. Sanchez and Respondent Woolridge as the alleged victim. The matter was taken under advisement and Mr. Sanchez was ultimately found not guilty of both charges. Clearly, the charges of aggravated assault and disorderly conduct are directly related to the defenses being asserted in this matter–that the Respondents acted as reasonable officers under the circumstances. The fact that Mr. Sanchez was acquitted of these charges is probative on the issue of whether the

charges were without a basis in fact and are relevant to show the officers' state of mind at the time they were claiming to be legally arresting Mr. Sanchez for allegedly assaulting them. In light of this direct connection between the not guilty judgement and the Respondents' asserted defenses, the acquittal is useful to the jury to determine whether it is more or less probable that the Respondents' use of force was excessive or unreasonable.

Moreover, acquittal of the related, underlying criminal charges is relevant to show the officers' state of mind in that the charges were without basis in fact and were therefore, malicious. This is a necessary component to the determination of punitive damages which was plead by Mr. Sanchez and instructed to the jury. In order for Mr. Sanchez to have been awarded punitive damages, it was necessary for him to prove that the "defendant's conduct was malicious, oppressive or in reckless disregard of the plaintiff's rights." *See* Ninth Circuit Model Civil Jury Instructions, 5.5 Punitive Damages. It is intuitively illogical to permit a party to seek a relief but, foreclose the party from presenting relevant evidence to prove the elements of such relief.

The Court of Appeals cited to *Graham v. Connor*, in support of its holding that state of mind is legally irrelevant given the objective reasonableness standard used in excessive force claims. 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). However, the Court of Appeals overlooked the fact that even the *Graham* Court acknowledged that a fact-finder may use such factors as an officer's ill-will toward a citizen to assess the credibility of an officer's account of the

circumstances that prompted the use of force. *Id* at 399, FN 12. Additionally, when qualified immunity is advanced as a defense as in the present matter, whether an officer could reasonably have believed that the force used did not violate the Fourth Amendment– in other words, the officer's *objective* "good faith"– is relevant to whether the qualified immunity defense is indeed available. *Id.*

The fact that Mr. Sanchez was acquitted of the criminal charges of assault and disorderly conduct is relevant to show that Woolridge and Doyle harbored ill-will toward him and called into question Woolridge's and Doyle's credibility as to their account of the circumstances they claim prompted the use of force. Such evidence would have also aided the fact finders in their determination as to whether the officers' actions were reasonable in their belief that the force they used did not violate the Fourth Amendment, thus making available a qualified immunity defense. Additionally, the evidence of acquittal would have further been relevant to a determination of whether or not Woolridge's and Doyle's actions were malicious, oppressive or reckless for purposes of awarding punitive damages. The District Court's exclusion of such relevant evidence did nothing less than ham-string Mr. Sanchez's ability to present relevant evidence to rebut the qualified immunity defense claim to show that the officers' actions were not objectively reasonable under the circumstances but were in fact malicious warranting a Plaintiff's verdict and an award of punitive damages. Where a lower court commits a clear abuse of discretion in excluding evidence that is relevant, reversal is warranted. *See DeAnda, supra.* at 1421-22. The admission or preclusion of such important

relevant evidence in civil rights cases presents important questions–the answers to which would be beneficial to the decision making process of similarly situated litigants and judges.

CONCLUSION

For all of the reasons stated herein, a Writ of Certiorari should issue to review the judgment of the Court of Appeals, reverse and remand the matter to the District Court with instructions to permit Mr. Sanchez the opportunity to disclose a substitute police practices expert and to allow admission of evidence of the acquittal of the criminal charges, grant him a new trial and order such other and further relief as may be appropriate.

Respectfully submitted,

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Case No. CV-05-583-TUC-RCC
UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

FRANCISCO U. SANCHEZ,
Plaintiff,

KARL J. WOOLRIDGE, DONALD E. DOYLE,
Defendants,

AMENDED JUDGMENT IN A CIVIL CASE

This action came before the Court for a trial by jury.

IT IS ORDERED AND ADJUDGED that Judgment be entered in favor of the Defendants and against the Plaintiff and the Plaintiff shall take nothing from his complaint.

IT IS FURTHER ORDERED AND ADJUDGED that $4,705.70 shall be taxed by the clerk and is made part of the judgment pursuant to Bill of Costs entered on October 2, 2008.

August 27, 2008 Date
October 2, 2008 Date Amended

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA CIVIL MINUTES - GENERAL

Date: November 19, 2007

Civil Case: No. CV-05-583-TUC-RCC

Title: Francisco Sanchez v Clarence Dupnik, etc., et al.,

Present: HON. Ranier C. Collins, Court

Deputy Clerk: Maureen Gorski

Reporter: Bonnie Brunotte

ATTORNEY(s) FOR PLAINTIFF(s): Herbert Beigel

ATTORNEY(s) FOR DEFENDANT(s): Nancy Davis

PROCEEDINGS: XX Open Court

MOTION HEARING:

Plaintiff Francisco Sanchez is present.

Signed affidavit by attorney Natasha Wrae presented to the Court and ordered filed.

Counsel present arguments to the Court. This case had proceeded to a settlement conference.

IT IS ORDERED GRANTING Plaintiff's Motion to Withdraw from Joint Pre-Trial Order/Notice to hire

new counsel (#61) and DENYING Defendants' Motion to Strike (#63).

IT IS FURTHER ORDERED that the previous stipulations entered into are stricken and FURTHER ORDERED that there will be no reopening of discovery and no new disclosures. Affidavits filed are not stricken.

IT IS FURTHER ORDERED setting the final Pre-Trial Conference for December 14, 2007 at 1: 30 p.m. Plaintiff Sanchez to be present. Proposed Joint Pre-Trial Order to be submitted by December 11, 2007.

Counsel Herbert Beigel to file motion to withdraw for the record.

November 19, 2007
Docket No. CV05-583 TUC-RCC
UNITED STATES DISTRICT COURT DISTRICT
OF ARIZONA

FRANCISCO SANCHEZ, Plaintiff,

VS.

CLARENCE DUPNIK, et al., Defendants.

Transcript of Motion Hearing

BEFORE THE HONORABLE RANER C. COLLINS
UNITED STATES DISTRICT JUDGE

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THE COURT: All right. Here's what I'm going to do. I'm going to strike the joint pretrial, the stipulation at this point in time. There will be no reopening of the discovery. I'm going to set the final pretrial conference in this case for December 17 at 1:30.

MR. BEIGEL: Your Honor, would it be either the week before or the 20 -- well, don't want to do it on the 24th. I have to be in New York in a court appearance on the 17th.

THE COURT: How about the 19th?

MR. BEIGEL: I have to be in New York all that week.

THE COURT: How about December 14th? Are you leaving that Friday?

MR. BEIGEL: No.

THE COURT: Let's try December 14th at -- I'm starting a trial on the 11th; right? I'm supposed to. Let's try December 14th at 1:30. That's a Friday.

MR. SANCHEZ: Your Honor. I don't want Mr. Beigel to represent me.

THE COURT: That's between you and Mr. Beigel. I haven't told you who your attorney is going to be and I'm not going to. All I'm doing is this, the pretrial conference is set for December 14th at 1:30. You can have whoever your attorney is with you at that point in time.

MR. SANCHEZ: Okay. Thank you very much.

MR. BEIGEL: And I was not clear about the pretrial order.

THE COURT: I haven't even looked at the pretrial order, but the stipulations that you guys entered into, I'm striking those and they can start over from square one.

MS. DAVIS: And just to be clear, Your Honor, he's not going to be allowed to come in with new experts

THE COURT: No new discovery. This case is ready for the final pretrial conference.

MR. BEIGEL: So if a proposed new attorney calls me, I can tell them that

THE COURT: That

MR. BEIGEL: -- whatever stipulations, but discovery is closed, no more disclosures, it's just a matter of setting it for trial and submitting a new pretrial?

THE COURT: And -a new pretrial order, that's correct.

MR. SANCHEZ: What does that mean, sir?

MR. BEIGEL: When does the Court want the new pretrial order?

THE COURT: I need it by three days before the 14th.

What that means, Mr. Sanchez, is on December the 14th this case is going to get set for trial. We'll determine exactly when it's going to be tried.

What it also means is the only thing new that may happen in this case is that whoever your attorney is will have a chance to discuss with Ms. Davis what new stipulations, if any, they're willing to enter into and what the new pretrial order is going to say, but other than that this case is going to trial. No new witnesses, no new discovery, the case ready for trial.

MR. SANCHEZ: Your Honor, Mr. Beigel never had witnesses that was to help me out in the case. I was the main witness, sir. Mr. Beigel never -- if we go to trial, Monique Onette (ph.), I mean, she would be my main witness, and he never called no other witnesses, and Mrs. Wrae is willing to call the other witnesses that Mr. Beigel didn't call for the trial, sir.

Filed 08/04/2008

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA CIVIL MINUTES - GENERAL

Date: August 4, 2008
Civil Case No. CV-05-00583-TUC-RCC(CRP),
Title: FRANCISCO U. SANCHEZ v. PIMA COUNTY SHERIFF CLARENCE DUPNIK, et al

Present: HON. Raner C. Collins
Deputy Clerk: Maureen Gorski
CourtSmart: Allison Siqruieros
ATTORNEY(s) FOR PLAINTIFF(s): Natasha Wrae
ATTORNEY(s) FOR DEFENDANT (s): Nancy C. Davis

PROCEEDINGS: XX Open Court

HEARING ON PENDING MOTIONS:

Plaintiff Francisco Sanchez is present with counsel. Counsel present arguments to the Court.

IT IS ORDERED as follows:

Defendants' First Motion in Liming re: to preclude testimony of Patricia Gallegos Duran (#74) is DENIED and impeachment witneses are allowed; Second Motion in Limine re: guilty decision in Plaintiff's criminal case (#75) is GRANTED; Third Motion in Limine re: Plaintiff's lack of damages calculation by Plaintiff (#76) is DENIED; Fourth Motion in Limine re: tasers causing or contributing to the death of others (#77) is GRANTED; Fifth Motion in Liming re: changes in use

of force policy/subsequent remedial measures #78) is GRANTED; Sixth Motion in Limine re: arrest of Plaintiff (#79) is GRANTED; Seventh Motion in Limine re: hearsay statements of bystanders (#80) is GRANTED; Eight Motion in Limine re: failure to disclose certain medical records (#81) is DENIED.

Plaintiff's Motion in Limine re: to preclude evidence of alleged illegal drug use and/or blood alcohol tests (#82) is DENIED in part. Whether or not the actual blood reading comes in is left up to the defendant being able to show proper foundation.

Plaintiff will be allowed to disclose pain and suffering but will not be allowed to argue whether lawful arrest.

Plaintiff's request to call Lieutenant Kester as an expert in their case-in chief, which is objected to by defense counsel is DENIED.

Defense counsel agrees to provide Plaintiff's counsel with contact information for Deputy Doyle

August 4, 2008
CV 05-583-TUC-RCC
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

FRANCISCO SANCHEZ, Plaintiff,
V.
CLARENCE DUPNIK, ET AL., Defendants.

MOTION HEARING
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Tucson security personnel not being properly disclosed, I think if Ms. Wrae looks through her pleadings in this case, the defendants actually filed a separate list of trial witnesses that I believe was one of the court's earlier orders in this case. All of those people are listed as trial witnesses.

With respect to Ms. Duran, Ms. Wrae herself acknowledged that all Mr. Beigle did was say any and all of defense witnesses. Again, I have a copy here if the court would like to review it. Ms. Duran was never listed as a witness by the defendants, just as a person with information regarding the knowledge and events giving rise to this lawsuit.

And, of course, we admit that we did know of her existence, but she has never been listed as a trial witness by the plaintiff or the defendants in this case.

THE COURT: I will let Ms. Duran testify. If she denies resigning in lieu of being fired, you can bring in a rebuttal witness to testify about her situation how she left the sheriffs department.

MS. DAVIS: Thank you, Your Honor.

Our second motion deals with the not guilty decision in plaintiff's criminal case in justice court.

THE COURT: Ms. Wrae, how is it relevant?

MS. WRAE: You want me to take over, Judge?

THE COURT: Yeah. On that one you have to convince me it is relevant. I can almost hear you saying right now if he was found guilty that I wouldn't be allowed to let that in. You wouldn't want to let me let that in either.

MS. WRAE: If it was my assessment of the case, Judge, I would have never taken the case at that point. It is one of my criteria that they prevail at the criminal matter before I will actually take over a civil matter.

THE COURT: But the fact they prevailed doesn't mean it's coming in, does it?

MS. WRAE: That's true.

Under the case law there would be a suggestion through the dicta in the Newell case that where the circumstances surrounding the dismissal of the criminal charges goes to whether or not the citation was appropriate and it's basis in fact or whether or not it's relevant to the officer's state of mind it could come in.

We have no case law. I mean, it's just doesn't exist that I'm aware of that says on point as far as these circumstances are concerned it doesn't come in.

What we have is a lot of case law where we have it dismissed for a technicality. For instance, at the preliminary hearing stage and it is dismissed. Where it's dismissed, for instance, in a DUI when they failed to provide the individual the notice that they can get an independent test. It is dismissed on that sort of technicality.

In these particular circumstances, we have full-blown testimony, five witnesses, an actual bench trial where the evidence and the circumstances were presented to the judge on aggravated assault charges as well as disorderly conduct charges and the judge provided a verdict of acquittal.

THE COURT: Here's what's left in this case. This case the issue is excessive force, right?

MS. WRAE: That's correct, Judge.

THE COURT: It's not lack of probable cause to make an arrest or anything like that. It's excessive force. So if it's only excessive force is the issue, whether or not he was acquitted of assault or disorderly conduct is irrelevant the way I look at it.

MS. WRAE: Judge

THE COURT: You have to convince me I'm wrong.

MS. WRAE: You have touched on sort. of a criminal defendant attorney's way of reviewing cases.

When a person presents themselves and says, I was beat up by the police, then my first response is where is

the aggravated assault charge. Because typically they are going back and forth. Excuse me. I messed up.

When they say they have been beat up by the police, then I'm seeing an aggravated assault charge because that gives the officer's reason or we see some sort of resisting arrest charge.

Under these circumstances we have an aggravated assault charge that had no merit. And as a result he was acquitted of it after full-blown testimony which bolsters the concept in our minds that obviously it didn't happen. He wasn't resisting arrest. He wasn't providing all these different aspects that the officers are claiming was the necessary element providing them to use the force against Mr. Sanchez because the aggravated assault charge he was acquitted on.

It goes to their state of mind and it goes to the basis in fact of that citation. If he truly wasn't resisting or wasn't being noncompliant, as they suggest in their pleadings, then there wouldn't have been a problem. They wouldn't have needed to hit him with the aggravated assault charge.

Under these circumstances, he's being charged with aggravated assault for hitting I think Sergeant Woolridge at the time in the head and throwing beer at him. He's acquitted of those. That was -- that is how we make it relevant.

It's indicated in the dicta of the Newell case that under those circumstances, it would be relevant to show the officer's state of mind as well as whether or not the citation itself had a basis in fact which goes directly to

whether or not they were justified in their use of force. Because if there was no basis in fact to the aggravated assault charge, they had no reason to use force against him. That is how I make it relevant, Judge.

THE COURT: Ms. Davis.

MS. DAVIS: Yes, Your Honor.

I think it is important to note that in the realm of Section 1983 cases, you can resist arrest without actually committing the crime of aggravated assault or hitting a police officer and there is case law within the Ninth Circuit as well as other circuits that allows for the use of force by an officer even when there's 'not a charge of aggravated assault. It will just depend on the fact of circumstances.

The other important thing to keep in mind here is under the excessive force standard, it's not the subjective understanding of the individual officers on the scene that is relevant. It's an objective standard. It is what would a reasonable officer have done and whether they would have used that level of force.

So the fact that he was acquitted at a bench trial on an aggravated assault charge, you know, it's just irrelevant. There's different standards of proof in a criminal case versus a civil case. It's just not relevant to the issues in his lawsuit against the defendants in this case.

THE COURT: I have to agree. It's not relevant. It's out.

MS. DAVIS: Our next motion in limine -- and I will go ahead and address motions in limine 3 and 8 since they do kind of overlap.

One has to do with the lack of appropriate damages calculation as required by the Federal Civil Rules of Procedure from the plaintiff as well as failure to disclose certain medical records, specifically records from 2006, 2007 and then through 2008.

Ms. Wrae did bring me an envelope of medical records this morning. I have not had an opportunity to go through and see what is in there, how much is new, how much is old.

We did get some records from prior counsel in July of 2006 in response to some discovery requests we had done. Those records are very limited and do not cover the last two and a half years $2,500 in medical bills and another $545 of co-pays associated with him alone and he had nothing to do with the hand surgery. He vas just the primary care physician who saw him for his back pain and everything else as well as his ankle injury.

So I don't think that should be allowed to come in at a minimum.

THE COURT: It comes in.

MS. DAVIS: Next motion I have then relates to the use of the taser and whether Ms. Wrae intends to produce any evidence or question any of the witnesses in this case about whether they have heard that the fact of the Laser may or may not have contributed to the death or serious bodily injury of other people.

I think it is irrelevant to the issues in this case. She has no expert witness that is going to testify regarding the Laser. That information lacks serious foundational issues. To the extent there are people who have died from the use of a Laser, there's no indication anywhere in any disclosure or other information any of that was occurring in 2003 which was the date of this incident, whether the officers had any knowledge of that and whether there is any relevance to this case.

We think the danger of undue prejudice is much more substantial if that type of information is allowed to come in without any foundational background to support it. So we think that should be excluded.

THE COURT: Ms. Wrae.

* * *

lawfulness of the arrest.

We do have Lieutenant Kester who has been disclosed as an expert. Is he going to be permitted to say whether or not the arrest was lawful or unlawful?

THE COURT: I don't know how you are going to get into it, to be honest with you. No one is going to bring up the lawfulness of the arrest. If someone brings it up in terms of saying it was unlawful, then he can certainly say it was. There is no reason for you to say it was unlawful.

MS. WRAE: I just want to make sure it is something I need to prepare for if their expert

THE COURT: Even if he says it was lawful, so what?

MS. WRAE: It bothers us.

THE COURT: It bothers you, but so what? You can have damages resulting from a lawful arrest.

MS. WRAE: That's true, absolutely true.

Judge, this is kind of a highly unorthodox request from the plaintiff's point of view.

I am very aware of the history of experts in this case. I don't know why Mr. Beigle dropped the ball and did not provide an expert for Mr. Sanchez. There is an expert that has been fully disclosed and fully presented by both parties except I don't know he was ever deposed. Do you know?

MS. DAVIS: Excuse me? Our expert? I don't believe Mr. Beigle deposed him.

MS. WRAE: I'm imploring the court to allow me to call Lieutenant Kester as our expert. I don't know that it adds one way or another. He will do all hypotheticals anyway. It looks weird that we don't have an expert and it is obviously Mr. Beigle's fault for not getting one. If I might give the court a little perspective, at the time of the plaintiff's expert dying and being unavailable and the court saying you cannot hire another one or give extended amounts of time, I had received a jury verdict in another excessive force case in front of Judge Marshall around that same time that was in the paper and yet Mr. Beigle did not contact me and say who are you using for your expert.

Instead, I get the impression from all the correspondence that he can't find anyone when in actuality we had a case that was media worthy that was -- I could have easily been contacted and said who are you using.

I asked the court to be able to use Mr. Could (phonetic) in these proceedings. The court said no further disclosure.

Under those circumstances, I am seeking -- and maybe I can do it anyway. We didn't list him specifically, Lieutenant Kester, because he is for all intents and purposes only listed as the defense expert. I'm seeking to be able to call him during the plaintiff's case in chief and go with it from there.

THE COURT: Ms. Davis.

MS. DAVIS: I object, Your Honor. You know, she can certainly cross-examine Lieutenant Kester in our case in chief. I don't know what other purpose she would have for calling him in her case in chief other than to get some strategic advantage which unfortunately for Mr. Sanchez prior counsel failed to preserve for him when he failed to get a second expert after having adequate time to do so.

THE COURT: I have to agree with Ms. Davis.

MS. WRAE: Judge, I don't know the case law on this issue. It was something that sort of caused me concern.

Is there going to be any issues with us giving the case to the jury if the plaintiff does not call an expert?

THE COURT: I don't know.

MS. WRAE: That was the only other concern I harbored. Of course, Mr. Sanchez has a remedy against Mr. Beigle for that.

THE COURT: That's another case. I'm not involved in that one.

MS. WRAE: The only other issue that I see is I have no contact information for former deputy Doyle. I would like to subpoena him as a witness in the plaintiffs case in chief. He's a defendant. I don't know if I might do that through Ms. Davis.

I am sort of on the record seeking some help and guidance with that.

MS. DAVIS: If she wants to subpoena -him, that's fine. We will get her the information. He's been subpoenaed by us to appear and he'll be here the whole time absent -- he does have heart trouble.

No. 08-17272

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO SANCHEZ,
Plaintiff-Appellant,
v.
CLARENCE DUPNIK, Pima County Sheriff, KARL J. WOOLRIDGE, JANE DOE DOYLE, DONALD DOYLE,
Defendants-Appellees.

December 11, 2009, Argued and Submitted, San Francisco, California

January 14, 2010, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the District of Arizona. D.C. No. 4:05-CV-00583-RCC.

COUNSEL: For FRANCISCO SANCHEZ, Plaintiff - Appellant: Natasha Wrae, Esquire, Attorney, LAW OFFICE OF NATASHA WRAE, Tucson, AZ.

For KARL J. WOOLRIDGE, JANE DOE DOYLE, DONALD DOYLE, CLARENCE DUPNIK, Pima County Sheriff, Defendants - Appellees: Nancy J. Davis, PIMA COUNTY ATTORNEY'S OFFICE, Tucson, AZ.

Before: SCHROEDER and CALLAHAN, Circuit Judges, and LYNN, ** District Judge.

MEMORANDUM [*]

Appellant Francisco Sanchez appeals the district court's judgment, after a jury trial, based on the verdict that Appellees Woolridge and Doyle, deputy sheriffs in the Pima County Sheriff's Department, were entitled to qualified immunity on a claim for excessive force asserted under 42 U.S.C. § 1983. This court has jurisdiction under 28 U.S.C. § 1291. Appellant complains of the district court's rulings on discovery issues and on the admission of evidence. We review those rulings for abuse of discretion. *See Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1009 (9th Cir. 2004); *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc).

I.

The district court did not abuse its discretion by not reopening discovery to allow Sanchez to designate a new expert witness. Sanchez did not show substantial justification for his failure to timely disclose an expert, nor did he demonstrate that there would be no harm to the Defendants from the late designation. *See* Fed. R. Civ. P. 37(c)(1). Sanchez did not disclose an expert by the court-ordered August 9, 2006 deadline nor by the stipulated April 1, 2007 deadline, established by agreement in light of the death of Sanchez's original expert. The Rule 16 Scheduling Order had set the deadline for pretrial motions, and the disruption to the court's and the opposing parties' schedules, which would occur by lifting the deadlines, was not harmless, although the trial date was months away. *See generally Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005). The fact that Sanchez's prior

counsel was dilatory in identifying a new expert does not show substantial justification. We cannot say that the district court abused its discretion in adhering to the deadlines in place.

II.

The district court acted within its discretion by denying Sanchez's request to call the opposing party's expert as his own expert during his case-in-chief. Sanchez failed to comply with the disclosure requirements of Fed. R. Civ. P. 26(a)(2) and requested to call his opponent's expert only fifteen days before trial. Although some courts have held that once a witness is designated as an expert, he or she may be called by the opposing party, although not designated by that party, those decisions did not address the issue of whether a district court abuses its discretion by denying a request to call an opponent's expert. *See, e.g., Nat'l R.R. Passenger Corp. v. Certain Temp. Easements*, 357 F.3d 36, 42 (1st Cir. 2004); *Kerns v. Pro-Foam of South Alabama, Inc.*, 572 F. Supp. 2d 1303, 1305, 1308-10 (S.D. Ala. 2007). At the time of the request, Sanchez's counsel stated that "I don't know that it adds one way or another" to call opponent's expert, but noted that "[i]t looks weird that we don't have an expert . . . ." Sanchez was permitted to fully cross-examine his opponent's expert during trial. The district court properly could have concluded that the flimsy reasons for altering the order of presentation of evidence so soon before trial were outweighed by the risk of unfair surprise and prejudice to Defendants' anticipated presentation of their case. Accordingly, the district court's decision did not lie "beyond the pale of reasonable justification under the circumstances." *See Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

III.

The district court did not abuse its discretion by excluding evidence of Sanchez's acquittal on the charges arising out of his arrest. Sanchez offered the acquittal as relevant to the arresting officers' state of mind. Since state of mind is legally irrelevant to a claim of excessive force, which is analyzed for objective reasonableness, the district court was within its discretion to exclude evidence of Sanchez's acquittal. *See generally Graham v. Connor*, 490 U.S. 386, 391-92, 397-99, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1981).

AFFIRMED.

Footnotes

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The Honorable Barbara M.G. Lynn, U.S. District Judge for the Northern District of Texas, sitting by designation.

02/24/2010

No. 08-17272

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO SANCHEZ,
Plaintiff-Appellant,
v.
CLARENCE DUPNIK, Pima County Sheriff, KARL J. WOOLRIDGE, JANE DOE DOYLE, DONALD DOYLE,
Defendants-Appellees.

ORDER

Before: SCHROEDER and CALLAHAN, Circuit Judges, and LYNN,* District Judge.

The petition for panel rehearing is DENIED.

03/04/2010

No. 08-17272

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO SANCHEZ,
Plaintiff-Appellant,
v.
CLARENCE DUPNIK, Pima County Sheriff, KARL J. WOOLRIDGE, JANE DOE DOYLE, DONALD DOYLE,
Defendants-Appellees.

MANDATE

The judgment of this Court, entered January 14, 2010, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

Cost is awarded to the appellee in the amount of $55.20.

4/30/2010

No. 08-17272

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO SANCHEZ,
Plaintiff-Appellant,
v.
CLARENCE DUPNIK, Pima County Sheriff, KARL J. WOOLRIDGE, JANE DOE DOYLE, DONALD DOYLE,
Defendants-Appellees.

ORDER

Before: SCHROEDER and CALLAHAN, Circuit Judges, and LYNN, District Judge. *

Appellant's Motion to Recall Mandate is denied. Appellant's untimely Petition for Rehearing En Banc will not be considered.

Filed 08/01/2007
Docket No. CV05-583 TUC-RCC
UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA

FRANCISCO SANCHEZ, Plaintiff,

VS.

CLARENCE DUPNIK, et al., Defendants.

AFFIDAVIT OF: NATASHA WRAE, ESQ.

That NATASHA WRAE, upon her oath, deposes and states as follows:

1.) That I am an attorney in good standing, licensed to practice law in the courts of Arizona, both State and Federal;

2.) That I am regularly presented with civil rights claims of police misconduct to determine appropriateness for litigation;

3.) That Mr. Francisco Sanchez contacted me after settlement negotiations in the above captioned matter to obtain my opinion regarding the merits of the case and possibility of substituting in for Mr. Sanchez's current attorney, Herbert Beigel;

4.) That I have done a cursory review of Mr- Sanchez's file in this matter provided to me by Mr. Beigel however, that at the time of preparing and signing this affidavit I was but of state without the benefit of Mr. Sanchez's file in front of me but, make this affidavit in

good faith and with my best recollection of the contents of said file;

5.) That I have reviewed the Joint Proposed Pre-trial Order prepared and filed in. this matter during the first week of July and that I have reviewed its contents, including the stipulations, witness lists, claims and damages with Mr. Sanchez;

6.) That Mr. Sanchez advised me following the review of the Joint Proposed Pre-trial Order that he never spoke to Mr. Beigel regarding said Order or its contents and he never greed to the stipulations it contains;

7.) That after obtaining Mr. Sanchez's file from Mr. Beigel and reviewing it and reviewing the Joint Proposed Pre-trial Order with Mr. Sanchez, that I contacted opposing counsel, Nancy Davis, who was unsympathetic to Mr. Sanchez's situation with his attorney, was uncooperative and in essence refused to speak with me on substantive case matters sch as the settlement negotiations since I had not substituted in as counsel for Mr. Sanchez.

8 .) That I explained to Ms. Davis that I am currently in an advanced state of pregnancy am due to have my baby on August 27 , will be on maternity leave until the second week of January 2008, that I could not go to trial on the case until after the maternity leave and that in light of this, the expert I use, Larry Gould, PhD, who is based in Flagstaff, could be disclosed as Plaintiffs, expert without any additional unnecessary time delays or extensive costs, to either party. Ms. Davis was again unsympathetic and unrelenting in her desire to push this case forward to trial before the end of the year in

spite of my current condition and the fact that Larry Gould has been deposed by her office numerous times on his experience qualifications and expertise in police practices and use of force;

9.) That I have personally spoken with Dr. Gould, have discussed the basic facts of the case, and have inquired, as to his desire and ability to assist as an expert in this matter. Dr. Gould assured me that he wants to assist and is available for a trial in this matter in February of 2008 (currently he has two trials scheduled in Louisiana in January);

10.) That in my professional opinion and in light of my current physical condition, that I would be remiss in substituting in for Mr. Beigel given the current proposed stipulations and Ms. Davis' trial date expectations and that such minor delay and addition of a Plaintiffs expert would not "re-open discovery and litigate the case anew." That I understand Plaintiff's previous expert 'had been fully disclosed and had suffered a fatal heart attack. That Mr. Beigel had been given an opportunity by this Honorable Court to secure a replacement expert but, claimed that none could be found in spite of the fact that Dr. Gould is regularly used by attorneys such as myself and Michael Bloom in Tucson on police misconduct cases. In fact, Dr. Gould testified very recently in the high-profile case of Dennise Wilson v. Pima County, et al., which was tried by me in front of the Honorable Jacqueline Marshall late April of this year resulting in a plaintiff's judgment of over $62,000 in compensatory damages and $400,000 in punitive damages against two deputies of the Pima County Sheriffs Department for using excessive force.

11.) That I am familiar with the Pima County Attorney's office Civil Division's "bluff" of advising plaintiff attorneys that punitive damages cannot be sought in actions of this type by citing to state statutes. That it appears to me, in light of the stipulation in the Joint Proposed Pre-trial Order, that Mr. Beigel has fallen prey to this "bluff" and has stipulated that Plaintiff will not be seeking punitive damages.

12.) That my review of the file has revealed that Mr. Sanchez was tried and acquitted of any criminal wrong doing related to the instant matter. In light of this, it was quite surprising to see that Mr. Beigel had stipulated on Plaintiffs behalf that Defendants had probable cause to arrest Plaintiff and that the arrest was lawful.

13.) That at the criminal trial, two witnesses were called who testified on Mr. Sanchez's behalf basically asserting that he did nothing wrong and nothing to warrant the actions of the Defendants. That my recollection is that the names of these two witnesses are not among those in the Joint Proposed Pretrial Order.

14.) That I understand Mr. Sanchez was a healthy 50 year old with no physical incapacities prior to the incident in this matter. That as a result of the incident he is no longer able to work, is receiving public benefits, that his wife has used all of her retirement saved up over almost 40 years to pay for his medical expenses, that he still needs surgeries on his wrists as a result of the injuries, and that he walks with a cane. However, my review of the file was unable to reveal a clear request for damages by Mr. Beigel as well as the

necessary supporting documentation. That in light of this, it may be necessary to request an opportunity from the Court to properly disclose such information and to possibly call a future earnings expert to prove the extent of future loss. All of which, I am confident may be accomplished by the end of 2007 while I am on maternity leave and with sufficient time prior to trial;

15.) That it is my understanding that Defendants offered a maximum settlement offer of $8,000.00 at the settlement negotiations i' this matter. That Mr. Beigel encouraged Plaintiff to settle for this amount in spite of the extensiveness of Plaintiffs medical bills, future anticipated medical bills and inability to work. That Mr. Beigel has indicated that Plaintiff has a very low likelihood of success if the matter proceeds to trial and that this Honorable Court may not even let the matter go to the jury since Plaintiff does not have an expert to call at the trial.

16.) That Defendants offered a similar settlement in Wilson v. Pima County, et al. that Ms. Wilson logically rejected resulting in her unquestionable success at trial as set forth in paragraph 10 above;

17.) That I have explained to Mr. Sanchez that there is the possibility that he could lose if the case goes to trial and that if he goes to trial and loses that he could be ordered to pay the Defendants' costs in this matter. Mr. Sanchez acknowledged this and indicated hat he understood this

18.) That in spite of the numerous depositions and other case related work done in his case over the past couple of years, there seem to be some serious omissions or

oversights, by Mr. Beigel, such as the failure to secure an expert, list favorable witnesses and possible inadequate damages disclosure that can still be corrected so as to not result in an unjust result to Mr. Sanchez;

19.) That in my professional opinion, Mr. Sanchez has a meritorious cause of action against Defendants. That I recognize there may be some bad facts for Plaintiff but, that in my opinion such facts are not fatal to his case. That I am prepared to substitute in as counsel for Mr. Sanchez provided Mr. Sanchez is not bound to the current Joint Proposed Pretrial Order.

20.) That I am willing and able to take the necessary steps during the course of my maternity leave to have the case ready to go to trial in February, the earliest available date for Dr. Gould, and that I fail to see any legal prejudice that Defendants might sustain if the Court permitted sufficient time to file a new Joint Proposed Pretrial Order, permitted Plaintiff he opportunity to properly disclose Dr. Gould and possibly a future earnings expert, and permitted an opportunity to review and possibly disclose the necessary supporting evidence prove the extent of Mr. Sanchez's damages.

FURTHER, YOUR AFFIANT SAYETH NOT.

Docket No. CV05-583 TUC-RCC
UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA

FRANCISCO SANCHEZ, Plaintiff,

VS.

CLARENCE DUPNIK, et al., Defendants.

SECOND AFFIDAVIT OF: NATASHA WRAE, ESQ.

That NATASHA WRAE, upon her oath, hereby incorporates all paragraphs set forth in her previous affidavit dated July 31, 2007 (Doc. 64), supplements, deposes and states as follows:

1.) That I am aware this Honorable Court has set a status hearing on Plaintiffs' Motion to withdraw from Joint Pre-trial Order (Doc. 61) and Defendant's Motion to Strike Doc. 63) for Monday, November 19th, 2007 at 10:30 a.m.

2.) That since I am not-counsel of record for Mr. Sanchez, it did not seem appropriate for me to attend the status hearing.;

3.) That in the event the Court wishes for me to be present at such a hearing, I will make myself available if the Court wishes to set another hearing sometime in the future.;

4.) That I am still available, willing and eager to represent Mr. Sanchez given the opportunity to correct

the erro. and omissions which have occurred in his case.;

5.) That since the filing of my previous Affidavit (Doc. 64), I have had my baby, am in the office and attending court appearances, but am not setting any lengthy trials until after the first of the year due to the fact that I am still nursing and intend to keep doing so.;

6.) That since the filing of my previous Affidavit (Doc. 64), I have had several matters set for trial in the beginning of 2008. As a result, my first available date to conduct a trial in this matter, if given the opportunity, would be in March of 2008.;

7.) That if given the opportunity to correct the mistakes in this matter and represent Mr. Sanchez at a trial, I am confident that I can do so without undue delay such that a fair trial for Mr. Sanchez maybehad as early as March of 2008.;

8.) That upon learning of the scheduled status, hearing,I contacted Dr. Gould, the police practices expert I regularly use in cases of this nature, and he advised that he was still willing to assist Mr. Sanchez and, that due to more recent trial scheduling his first available dates for trial would b- in March of 2008.;

9.) That I have read Defendants lengthy Reply to Motion to Strike and would be happy to litigate the numerous legal issues at a later date if given the opportunity. And, that I maintain that there seem to be some serious omissions or oversights by Mr. Beigel, such as the failure to secure an expert, list favorable witnesses and possible inadequate damage's disclosure

that can still be corrected so as to not result in an unjust result to Mr. Sanchez

10.) That I am personally offended by Defendants' counsel's bold statement that she never had any conversation with defense counsel about the fact that she was pregnant, her advanced state of pregnancy, or her anticipated due date (Doc. 65 at 9)That such statement suggests that I was, lying to the Court or trying to mislead the Court. The reason I recall specifically advising defense counsel of my health status was to obtain some professional courtesy in the current matter. If defense counsel had been amenable to stipulating to withdraw the Joint Pretrial Order and agreeable to setting the matter in early 2008 for trial given the fact that I was pregnant.and unavailable to try the case, I would, have been able to do an immediate substitution of counsel. Moreover, it would have been unnecessary to involve the Court and waste numerous months of preparation by litigating Motion to Withdraw the Joint Pre-Trial order.

FURTHER, YOUR AFFIANT SAYETH NOT

Filed 11/19/2007